

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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SAG-AFTRA NEW YORK,	:	
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Respondent,	:	Case No. 02-CB-242132
	:	
-and-	:	
	:	
BENJAMIN SCOTT HAUCK,	:	
	:	
Individual.	:	
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CROSS EXCEPTION OF
RESPONDENT SAG-AFTRA NEW YORK
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION

Pursuant to Section 102.46 of the Rules and Regulations, Respondent Screen Actors Guild - American Federation of Television and Radio Artists New York (“SAG-AFTRA”) files this cross-exception to the jurisdictional determination of Administrative Law Judge Lauren Esposito’s April 22, 2020 decision in this matter (“ALJ Decision”).¹

1. SAG-AFTRA cross-excepts to the portion of the ALJ Decision that determined that the National Labor Relations Board possesses jurisdiction of this matter due to an employer’s (Picrow Streaming’s) membership in a multi-employer association even though the General Counsel failed to put forth sufficient evidence of commerce with respect to any of the employer members of that association. *See* ALJ Decision at 6-8; *see* Jt. Ex. 1.

¹ Joint Exhibits are referred to as “Jt. Ex.”; General Counsel Exhibits as “GC Ex.”; and Respondent Exhibits as “Resp. Ex.”

2. To demonstrate the Board's jurisdiction, the General Counsel has the burden to show that the matter involves a substantial impact on interstate commerce, *IBEW Local 48*, 332 NLRB 1492, 1507 (2000), which turns on whether an involved employer was engaged in interstate commerce. *Id.* Paragraphs 2(c) and 3 of the complaint -- which SAG-AFTRA did not admit, *see* Formal Papers Ex. E; Resp. Ans. ¶¶2(c), 3 -- allege that "[d]uring the preceding twelve months, Picrow, in conducting its business operations . . . provided services in excess of \$50,000 directly to customers outside" of New York, and therefore "has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act." Formal Papers Ex. C; Compl. ¶¶2(c), 3. There are no similar allegations with respect to any other employer in the Alliance of Motion Picture and Television Producers ("AMPTP"), the multi-employer bargaining representative to which Picrow is a member.

3. The only evidence the General Counsel presented in support of commerce is a Picrow Streaming Inc. questionnaire from a different charge involving a different union. Jt. 2 Ex. A. That questionnaire, dated February 4, 2019, does *not* cover the period "during the preceding 12 months" before the complaint -- as alleged in Paragraph 2(c) -- as the complaint was not filed until November 5, 2019 (and the hearing not held until 2020). Even more importantly, although the form indicated that Picrow provided services in excess of \$50,000 out of state, Jt. 2 Ex. A ¶9(F), it leaves blank the question of what time period this commerce information covers. *See id.* ¶9 (not checking any box to confirm that the data submitted was for the "most recent" calendar year, 12 months, or fiscal year).

4. In these circumstances, where the General Counsel introduced no commerce facts and is relying solely on a questionnaire from a case involving a time period not alleged in the complaint and in which the questionnaire was not properly filled in so that it is

impossible to know what time period it covers, the General Counsel has not met its affirmative burden to establish jurisdiction. *See Constr. & Gen. Laborers Local 1177*, 269 NLRB 746, 746 (1984); *Stage Employees IATSE Local 127*, No. 16-CB-219221, 2019 WL 2514911 (Div. of Judges June 18, 2019), *adopted by* 2019 WL 3493977 (NLRB July 30, 2019) (dismissing for failure to submit record evidence of employer's place in commerce and no evidence of same with respect to any other employer); *Mono-Trade Co. Inc.*, No. E 18-CA-14991, 1999 WL 33452826, at 2 (Div. of Judges May 21, 1999) (refusing to find jurisdiction based on 1997 commerce questionnaire where General Counsel's complaint pled jurisdiction based on the 1998 calendar year, but finding jurisdiction on alternative grounds).

5. The ALJ *agreed* with this logic. She too found that the “business volume information contained in the commerce questionnaire completed by Picrow does not provide an unambiguous basis for the assertion of jurisdiction.” ALJ Dec. at 7. This was true in particular because the General Counsel was unable to “identify a specific basis -- whether fiscal year, calendar year, or 12-month period” for which to base jurisdiction, and because the commerce questionnaire was silent on its period, and thus the General Counsel failed to meet its burden. *Id.* (the commerce questionnaire “contains no information regarding the specific time frame for the volume of business”).

6. Nevertheless, the ALJ held that “jurisdiction over Picrow may also be established based upon [its] membership in the AMPTP.” *Id.* The General Counsel, however, did not plead this as a basis for jurisdiction, nor did it make any argument that Picrow's membership in the AMPTP could serve as a basis for jurisdiction. *See* Compl. ¶¶ 2(c) and 3. Although the ALJ is correct when stating that the Board may assert “jurisdiction over a member of a multi-employer association . . . based upon the business activities of the association's

membership in the aggregate,” ALJ Dec. at 7 (citing cases), she overlooks a dispositive factor: that the General Counsel still must introduce *evidence* that at least one employer in the multi-employer association is engaged in commerce. *See IBEW Local 48*, 332 NLRB at 1498 (finding jurisdiction where although one employer did not meet threshold, another employer in multi-employer group was involved in commerce, but only where record evidence of commerce for that other employer existed).

7. Here, the only commerce evidence that the General Counsel introduced involved the Picrow questionnaire. It did not introduce any evidence with respect to any other employer in the multi-employer association, and for the reasons explained above, the evidence with respect to Picrow is insufficient because there is no basis to determine which time period the commerce questionnaire covers. Given the essential importance of establishing jurisdiction and the fact that it is the General Counsel’s burden to do so, *see Qualicare-Walsh, Inc.*, 269 NLRB 746, 746 (1984), the Board cannot, as the ALJ did, simply *presume* that the employers in the multi-employer unit (the AMPTP) meet the commerce requirement because the AMPTP has a significant number of members. *See id.* at 746 (complaint dismissed where General Counsel chose not to supplement the complaint’s allegations at the hearing); *IBEW Local 48*, 332 NLRB at 1498 (finding jurisdiction in similar circumstances but only where record evidence existed of jurisdiction based on another employer within the multi-employer association).

8. Accordingly, this case should be dismissed for lack of jurisdiction as the General Counsel has not introduced evidence establishing that any employer -- Picrow or any other employer in the AMPTP -- was involved in commerce in any specific time period prior to the issuance of the complaint.

Dated: New York, New York
June 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2020, I caused a true and correct copy of
the foregoing Cross Exception to be served by electronic mail on:

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